STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-309

November 10, 1998

MARY-ANN MACMASTER, ET AL v.
GARDINER WATER DISTRICT
Complaint Requesting Commission
Investigation of the Sale of
the New Mills Dam

EXAMINER'S REPORT

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file exceptions to this Report on or before **Friday, November 20, 1998.**

I. SUMMARY

In this Order, we find that the Gardiner Water District's actions in attempting to accept Mr. George Trask's offer to assume ownership of the New Mills Dam are void. We also find that any transfer of the New Mills Dam is subject to the procedural and substantive requirements of 35-A M.R.S.A. § 6109 and Chapter 691 of the Commission's Rules. Pursuant to those provisions, if the Gardiner Water District chooses to act on an offer to purchase the New Mills Dam made by Mr. George Trask or anyone else, it must offer the City of Gardiner the right of first refusal to purchase the Dam on the same terms and conditions.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 15, 1998, the Commission received a complaint against the Gardiner Water District (District) signed by Mary-Ann MacMaster and 17 other persons (Complainants). The complaint, filed pursuant to 35-A M.R.S.A. § 1302, requests that the Commission investigate several issues regarding the proposed sale of the New Mills Dam, currently owned by the District.

The New Mills Dam is located in the City of Gardiner along Cobbosseecontee Stream. The water held back by the Dam creates Pleasant Pond and is abutted by four municipalities: the City of Gardiner, and the towns of Litchfield, West Gardiner and Richmond (the four municipalities). The Dam was built in the 1840's to power a mill that was then alongside the Dam. The Dam was later owned by the City of Gardiner until the District obtained it in 1974. The District used the impoundment of the Dam as a water source until the 1950's, when the construction of the Maine Turnpike impaired the water quality and the District switched to two drilled wells for its water supply. In 1982, the District constructed a hydroelectric facility at the Dam and entered into a power purchase agreement with Central Maine Power Company pursuant to the Public Utilities Regulatory Policy Act. Operation of the hydroelectric facilities ceased in 1994 when CMP bought out the remaining term of the agreement.

Since the contract buyout, the sole purpose of the Dam has been to maintain the water levels established by the Cobbossee Watershed District. Because of the continuing maintenance expenses associated with the Dam and disputes concerning water flows in Cobbosseecontee Stream, the District decided to terminate its ownership of the Dam. On October 2, 1997, the District filed a petition with the Maine Department of Environmental Protection (DEP) to abandon the New Mills Dam, pursuant to 38 M.R.S.A. §§ 901-908 (the Dam Abandonment Act). This petition triggered a statutorily-prescribed 180-day period, expiring on March 31, 1998, during which persons willing to accept ownership of the Dam were sought. The District has asserted that it hoped that some party would surface during the dam abandonment process who would be willing to assume ownership of the Dam. By October 15, 1997, the District became aware that the four municipalities were considering the formation of an interlocal agreement to acquire the Dam. During November and December of 1997, the District encouraged and cooperated with the four municipalities in attempting to complete the interlocal agreement. However, the municipalities were unable to complete their efforts within the time deadlines prescribed by the Dam Abandonment Act.[1] Therefore, in January 1998, the four municipalities asked the District to withdraw its petition with the DEP to permit additional time for the creation of the

[1]The Dam Abandonment Act requires municipalities to act on the issue of dam ownership within 60 days of receiving notice of the intent to abandon.

necessary interlocal agreement. By letter dated February 2, 1998, the District declined to do so out of concern over the continued operation and maintenance expenses associated with the Dam.

Legislation was then introduced to permit affected municipalities to obtain a 180-day extension of the consultation period. District Trustee John Pulis spoke in opposition to the proposed legislation, indicating that an extension should be permitted only if the District's ratepayers were compensated for the ongoing maintenance costs incurred during an extension. After the legislative hearing, the Mayor of Gardiner, Brian Rines, announced that he would not reappoint Jack Pulis as a trustee of the Gardiner Water District when Mr. Pulis's term expired. In response, Gardiner City Councilor George Trask attempted unsuccessfully to build support on the Council for Mr. Pulis's reappointment. At least partly as a result of Mr. Pulis's testimony before the Legislature, Mayor Rines successfully opposed the reappointment of Mr. Pulis. The legislation was nonetheless enacted, but the four municipalities never exercised their right to obtain an extension.

Shortly before the original 180-day period was to expire on March 31, 1998, Mr. Trask notified the District that he was willing to assume ownership of the New Mills Dam. Although the

four municipalities had previously indicated that they would accept the Dam if no other person stepped forward, no party other than Mr. Trask had definitively stated that it desired to own the Dam. After receiving Mr. Trask's offer, the District Trustees held an emergency meeting on Sunday, March 29, 1998, at which two of the District's three trustees were present (including Mr. Pulis, whose term was to expire soon thereafter). At this meeting, the trustees voted to accept Mr. Trask's offer and transfer the Dam to Mr. Trask.[2] Because a new owner had been found, the District's DEP petition was withdrawn on March 31, 1998.[3]

The Complainants' petition sought to have the Commission initiate an investigation into the circumstances of the proposed transfer. As required by statute, the Gardiner Water District responded to the Complainants' allegations on April 28, 1998, arguing that its actions leading to the agreement to transfer the New Mills Dam to George Trask were reasonable and in compliance with all applicable laws. On May 27, 1998, the Commission issued its Order Initiating Investigation and opened this proceeding. Several procedural conferences were held and a technical conference was held on August 6, 1998, at which former trustee

[2]The vote was subsequently ratified by the full Board of Trustees on April 15, 1998.

[3]Notwithstanding these actions, the District voluntarily delayed actual legal transfer of the Dam to Mr. Trask pending the outcome of this proceeding.

Jack Pulis and the parties were available to discuss the facts of the case and answer questions. The parties waived a hearing in this case and stipulated that the transcript from the technical conference would be admitted in the record. A Preliminary Examiner's Report was issued on October 7, 1998.[4] The parties filed briefs and reply briefs and this Examiner's Report followed.

III. ANALYSIS

A. Complainants' "Burden of Proof"

The District argues that petitioners under 35-A M.R.S.A. § 1302 bear the burden of establishing a *prima facie* case, citing *Nancy J. Hogan, et. al. v. Hampden Telephone Company*, 36 P.U.R. 4th 480 (Me. P.U.C. 1980). Specifically, the District maintains that the Complainants in this matter "must demonstrate with affirmative evidence that the District's actions regarding the transfer to Mr. Trask were inappropriate." Brief of District at 5.[5] The District asserts that the Complainants have failed to produce any such affirmative evidence and, therefore, their complaint must be denied.

[4]Due to uncertainty regarding the legal issues in this case and the evidentiary record, the Advisory Staff agreed to issue a Preliminary Examiner's Report before briefing to provide guidance to parties as to the issues considered important by the Advisory staff.

[5]Page citations to the District's Brief refer to the fax numbering of the Commission's copy as the pages were apparently not individually numbered when printed.

The District misperceives our holding in the *Hogan* case. At page 487 of that opinion, the Commission describes the position of its Advocacy Staff that the petitioners in a Section 1302 proceeding bear the burden of establishing a "*prima facie*" case. In a footnote, however, the Commission clarified that it did not understand the Staff's use of the term "*prima facie*" to be equivalent to the requirement in civil litigation that the evidence presented by a plaintiff alone establishes a right to relief. Rather, the Staff argued that "it is sufficient that the complainants come forward with evidence that they are customers of the utility and that there are certain conditions of the utility's service which they find unsatisfactory." *Hogan* at 488. Assuming the petitioners meet this limited burden, the Staff argued that "the burden is on the utility, as an adverse party under [35 M.R.S.A.] § 307,[6] to prove that the conditions or practices complained of do not exist . . ." *Id.* The Commission adopted Staff's analysis of the petitioners' burden and found that it had been satisfied simply by the petitioners demonstrating that they were customers and that complaints existed; the petitioners were not required to demonstrate the validity of their claims by "affirmative evidence."

We similarly find that the Complainants have carried this burden in the present case. Although not all of the

[6]35 M.R.S.A. § 307 has been recodified as 35-A M.R.S.A. § 1314.

Complainants are customers of the District, a sufficient number of the District's customers signed the petition to satisfy Section 1302. Furthermore, there can be no question that the petition alleges violations of Title 35-A and the Commission's rules that are within the Commission's jurisdiction to consider. See *Agro v. Public Utilities Commission*, 611 A.2d 566 (Me. 1992).

B. Issues Identified in the Notice of Investigation

The Notice of Investigation identified several issues as the subject of this Investigation. The Complainants raised six issues regarding the proposed transfer of the New Mills Dam; the Commission's Advisory Staff identified two additional issues. Each of these issues is addressed separately below.

1. Was the Gardiner Water District under any obligation to notify the public of the March 29th trustee meeting and vote?

The Complainants have asked whether the District was required to provide public notice of its March 29, 1998 trustee meeting. At this meeting, the trustees voted to accept Mr. Trask's offer to assume ownership of the New Mills Dam. The March 29th meeting had originally been scheduled as a work session to discuss various matters, including District efforts to respond to what it perceived to be "misleading publicity" regarding the dam abandonment process.[7] Tr. C-35-36 & C-43.

[7]Although Mr. Pulis described the meeting in his testimony as an informal "work session," the agenda for the meeting appears to indicate that it was a more typical Board of Trustees meeting. ODR 1. In either event, the public should have been notified of the meeting as required by the Freedom of Access Law; the record is unclear as to whether the original meeting was publicly

After the meeting had been scheduled and noticed, but before the meeting was held, the District received Mr. Trask's offer on Friday, March 27th. Tr. C-128-129. At the direction of Trustee Jack Pulis, the agenda for the March 29th meeting was amended to include consideration of Mr. Trask's offer. The issue was raised at the March 29th meeting because a quorum of trustees would not be available again until after the expiration of the March 31st dam abandonment deadline.[8] Tr. C-64. Although the Trustees were notified of the agenda change by Tom Hayden, the District Superintendent, no further public notice was given of the amendment to the agenda. Mr. Trask also appeared at the March 29th meeting although he stated that he was unaware that his offer would be acted upon at that meeting. Tr. C-174.

As a quasi-municipal entity, the District is bound by the provisions of Maine's Freedom of Access Law, 1 M.R.S.A. §§ 401-410. Section 406 requires that public notice be given for all public meetings of the Board of Trustees. In addition, Section 406 specifically addresses "emergency" meetings such as the change to the March 29th meeting agenda. In such a case, the agency must notify local representatives of the media, "whenever practical," by the same means used to notify meeting attendees.

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advertised.

[8]One trustee, Lynn Girard, was out of the state and a second, Roger Gregoire, was scheduled to leave the state for business reasons during the following week.

Despite the fact that the District was aware of the agenda change by Friday afternoon (March 27th) and trustees were notified by telephone (Tr. C-143), no effort was made to notify local media representatives in a similar manner. This is true despite the fact that the District was well aware that the District's plans for the New Mills Dam were the subject of local media coverage; that coverage was, in fact, the original reason for calling the March 29th meeting. Under these facts, it is apparent that a violation of the Freedom of Access Law occurred.

This Commission does not, however, have direct jurisdiction to enforce the requirements of the Freedom of Access Law as it may apply to publicly-owned utilities. Furthermore, we need not address the issue of whether such a utility's violation of the Freedom of Access Law would require this Commission to find the utility's actions to be an "unreasonable act" within the meaning of 35-A M.R.S.A. § 301. It is uncontested that the Board of Trustees subsequently met on April 15, 1998, with all three trustees[9] present and unanimously ratified the vote taken on March 29th to transfer the Dam to Mr. Trask. No party has suggested that the April 15th meeting was not conducted in full compliance with the Freedom of Access Law. The subsequent vote, therefore, "cures" any ill effects of the March 29th actions.

[9]Since this meeting occurred after the expiration of Mr. Pulis's term, the three trustees were Lynn Girard, Roger Gregoire and Norm Gardner, Mr. Pulis's successor.

The District is cautioned, however, that the better approach is to follow the requirements of the Freedom of Access Law in the first place. Sufficient time existed to telephone local media representatives in this case and that effort should have been undertaken, particularly when the District knew that there was active public interest in this issue. Aside from complying with the law, such an approach has the additional benefit of allaying public fears that some type of "back-room" deal has occurred outside of public scrutiny.

2. Was the March 29th vote illegal?

Much of the previous discussion can be similarly applied to the issue of whether the March 29th vote was legal. In addition to the lack of public notice discussed above, the District failed to provide written notice of the meeting to its trustees, as required by the District's bylaws.[10] Noncompliance with technical meeting requirements can threaten the validity of actions taken at such a meeting. See 1 M.R.S.A. § 409(2). Once again, however, we need not decide whether the March 29th vote was effective action by the District since the actions were ratified through the subsequent April 15th vote. Nonetheless, the same cautions expressed above apply equally to this issue. In the future, the District should follow all technical meeting

[10]Article I, Section 3, of the District's bylaws requires that each trustee receive written notice in hand at least 24 hours before a meeting of the Board of Trustees. District Response, Exh. 25.

requirements to avoid future challenges to actions taken by the trustees.

3. Can these circumstances (surrounding the attempted transfer to George Trask) be considered an "unreasonable act" by the Gardiner Water District?

The Complainants contend that the proposed transfer of the New Mills Dam to George Trask is unreasonable because the circumstances surrounding the transfer raise questions about the propriety of the process employed by the District. The Complainants argue that this Commission has the duty to ensure that the trustees of a consumer-owned utility act reasonably and avoid taking actions motivated by personal bias or narrow political reasons.

We can conceive of certain compelling cases in which the Commission might have the authority to nullify utility actions on the basis that the actions had been taken for improper reasons, even if the ratepayers are not harmed by the actions in question. We need not definitively answer that question here, however, because we cannot find that such compelling circumstances exist on this record. The Complainants argue that when viewed in context, the combination of separate events leading up to the invalid March 29th vote render the proposed transfer "unreasonable." As we have found above, the District's actions in attempting to accept Mr. Trask's offer failed to comply with legal requirements. We also recognize that a

parochial political feud involving District Trustee Jack Pulis, then-City Councilor George Trask and Gardiner Mayor Brian Rines appeared to be occurring simultaneously with the District's actions. On balance, however, we believe that this record indicates that the District's actions complained of were the result of misunderstanding and haste, and were not motivated by any personal animus or political subterfuge. If this Commission does possess the power to invalidate utility actions based upon personal motivations, these facts do not justify its exercise.

4. Did the Gardiner Water District have any obligation to wait until April 6, 1998 (the date specified in a letter sent to the four municipalities) before agreeing to transfer ownership of the Dam to anyone other than the four municipalities?

On March 6, 1998, the District sent a letter to persons that it believed might be interested in owning the New Mills Dam. See District Response, Exh. 15. The letter states that as of April 6, 1998, the DEP will "take charge" of the petition and seek to determine if any State agency would be willing to accept ownership of the Dam. The letter continues to say that if no agency accepted the Dam, notice will be provided to affected communities and if an owner is still not found, the DEP will order the release of the waters impounded by the Dam. The letter closes by asking each person to contact the District before April 6, 1998 if he or she is interested in owning the Dam. Unbeknownst to the District at the time it sent the letter,

the actual expiration of the statutory 180-day period was March 31, 1998, not April 6, 1998. This clarification was made in a letter dated March 19, 1998 from Dana Murch of the DEP to the District with copies to each of the four municipalities and State Senator Sharon Treat. See District Response, Exh. 16. The District made no effort to notify other parties of the change in the date stated in the March 6th letter.

The Complainants have asked whether the District was obligated to wait until April 6, 1998 before agreeing to transfer the Dam to any person other than the four municipalities. It is unclear what legal restriction may have operated to create such a limitation on the District. Clearly, the March 6th letter was insufficient to create a contractual option right in the four municipalities or any other party. It is possible that some parties might argue that the District should be equitably estopped from taking action on the Dam until the April 6th date, since parties who did not receive Dana Murch's letter lacked notice of the date change and could reasonably have relied upon the April 6th date.[11] This argument is answered by the Law Court's decision in *Families United of Washington County v. Comm'r., Department of Mental Health and Mental Retardation*, 617 A.2d 205 (Me. 1992). In short, absent a

[11]The four towns would not be able to sustain an equitable estoppel argument in any event since they received actual notice of the changed deadline by copy of Mr. Murch's letter.

finding that an agency deliberately intended to mislead a party, estoppel will not lie against a public entity for innocent misrepresentations where a statute clearly establishes a contrary result. Here, the Dam Abandonment Act established the duration of the 180-day period. No party has suggested that the incorrect date described in the letter was intentional or designed to mislead Complainants.

In hindsight, the District probably should have attempted to notify the parties of the changed date. The District had, on its own volition, sent the March 6th letter to persons that it believed might be interested in obtaining the Dam. The District was aware of which of those persons had been copied with Mr. Murch's letter. Although it would have been preferable for the District to notify those interested persons who did not receive a copy of Mr. Murch's letter, it is understandable that such action was not taken given the confusion regarding the effect of the expiration of the 180-day deadline and the existence of subsequent opportunities pursuant to the Dam Abandonment Act to express an interest in obtaining the Dam. The record demonstrates that many of the parties were playing a waiting game to see if someone else would step forward and take the Dam. Although the District might have been more proactive in notifying parties, it was under no legal obligation to do so. We

find that the District was not obligated to withhold action on transferring the Dam until April 6, 1998.

5. Is the Gardiner Water District under any obligation to give the four municipalities first refusal on the Dam?

There is no general requirement that utilities offer a right of first refusal on utility property to municipalities or any other entity. A limited right of first refusal is granted to municipalities by 35-A M.R.S.A. § 6109 for land or property owned by a consumer-owned water utility for the purposes of "providing a source of supply, storing water or protecting sources of supply or water storage." The question presented in this case is whether Section 6109 applies to the proposed transfer of the New Mills Dam.

a. Does Section 6109 apply to the sale of dams?

The District raises several arguments against the application of Section 6109 to the sale of dams, suggesting that the Dam Abandonment Act solely governs the transfer of dams. First, the District notes that Section 6109 and our implementing rule[12] expressly apply to water resource "land or property." Unlike the Dam Abandonment Act, neither specifically refers to "dams." The District's focus on the absence of the precise term

[12]Chapter 691 of the Commission's Rules implements 35-A M.R.S.A. § 6109. The Commission's adoption of Chapter 691 was specifically authorized by 35-A M.R.S.A. § 6109(4).

"dam" overlooks the plain meaning of the actual words used in the statute (and repeated in our Rule). Section 6109 states:

> The following provisions govern the sale or transfer by a consumer-owned water utility of land or property owned by that utility for the purposes of providing a source of supply, storing water or protecting sources of supply or water storage, including reservoirs, lakes, ponds, rivers and streams, land surrounding or adjoining reservoirs, lakes, ponds, rivers or streams, wetlands and watershed areas.

There can be no question that the New Mills Dam is "land or property owned by [a consumer-owned] utility for the purpose of . . . storing water." The plain meaning of the statutory language supports the application of Section 6109 to the sale or transfer of dams owned by a consumer-owned water utility.

Second, the District notes that the legislative history of Section 6109 is silent as to its intended application to dams. The Statement of Fact for the bill that originally enacted Section 6109 states that the purpose of the bill was to give the public an opportunity to obtain water resource land for conservation or recreational purposes whenever a water district elected to put such land up for sale. 114th Legislature, L.D. 1982, "An Act to Preserve the Natural Values of Public Water Utility Lands," Comm. Amend. "A." The District also refers to testimony before the Legislature's Natural Resources Committee discussing the possibility that, due to enactment of

the Safe Drinking Water Act, many water utilities would be switching from surface water sources to groundwater. The fear was that these utilities would then sell property associated with the use of the former surface water source to the detriment of public recreation and conservation opportunities.

From this history, the District reasons that Section 6109 should be interpreted to apply not to the sale of dams but only to "developable" real estate. The District's argument unduly constrains the purpose of Section 6109. Clearly, the Legislature wanted to give local governments the option to intervene and acquire water utility property to prevent the development of previously pristine shorefront land that would restrict public recreation and conservation opportunities associated with the abutting body of water. Including dams within the sweep of Section 6109, however, also serves the same Legislative purposes. Consider the situation where a utility owns a dam and substantial shorefront property along the body of water created by the dam. It would be inconsistent for the statute to ensure that local governments possessed the opportunity to preserve public rights in the shorefront land but not in the very property that creates the recreational and conservation value in those lands. Without the dam, the public value in owning the shorefront lands is severely diminished; what was desirable waterfront property may become mudfront property.

Even the District admits in its Brief that an impoundment dam, like the New Mills Dam, benefits the public by "enhanc[ing] the recreational value of an upstream water body." Brief of District at 22. We find that an interpretation including dams within the application of Section 6109 furthers the purposes of the law.

The District also suggests that the inclusion of dams within the reach of Section 6109 is illogical because other utilities in the State own dams. Since the dams owned by other utilities (e.g. dams associated with hydroelectric facilities owned by electric utilities) are not subject to the provisions of Section 6109, it would be illogical to include dams owned by only consumer-owned water utilities. This argument neglects to consider the genesis of Section 6109 as described earlier. Section 6109 was introduced in reaction to the passage of the Safe Drinking Water Act and the resulting move by many water districts from surface water systems to groundwater systems. Because this situation created the possibility of dams and other water resource property being sold by water utilities, the Legislature responded by enacting Section 6109. Viewed in this light, Section 6109's restriction to water utilities is not so illogical or mysterious but follows naturally from the problem sought to be addressed by the Legislature.

Finally, the District suggests that a dam is unlike other water resource land in that it is unlikely to have value to a purchaser, but represents a potential liability. The District points to provisions of Section 6109 that indicate an expectation that the water resource land would be sold for value and reasons that, therefore, dams should not be included under the statute. The District's argument misperceives the statute's fundamental intent and impact. The fact that some property may not have substantial *economic* value is simply irrelevant to achieving the Legislative purpose of retaining an opportunity for the public to preserve substantial *recreational or conservation* values that may exist in the same property. Moreover, the Legislation appears to have expressly contemplated the possible transfer of property for no consideration by including "the sale *or transfer*" (emphasis added) of water resource land.

In sum, we find that the sale or transfer of dams falls within the plain meaning of the language of Section 6109. Furthermore, even if the language were determined to be ambiguous, we find that the inclusion of dams within Section 6109 is entirely consistent with the available legislative history and furthers the apparent purposes of Section 6109.

b. Does the New Mills Dam qualify as water resource land within the meaning of Chapter 691 of the Commission's rules?

On first blush, it appears that the present case falls squarely within the terms of the statute since the New Mills Dam is certainly "land or property" that stores water. The issue is complicated, however, by Chapter 691 of the Commission's Rules. Chapter 691 provides the following definition of "water resource land" subject to the rule's provisions.

> "Water resource land" means any land or real property owned by a water utility for the purposes of providing a source of supply, storing water or protecting sources of supply or water storage, including reservoirs, lakes, ponds, rivers or streams, wetlands and watershed areas, **and contains greater than five contiguous acres**. "Water resource land" does not include any land on which a utility has built a facility that is used exclusively for storing water as part of that utility's transmission and distribution system.

Chapter 691, Section 1(E) (emphasis added). The Rule, in effect, has adopted a five acre *de minimis* exception to the statutory requirement that a right of first refusal be given to adjoining municipalities.[13]

[13]The Complainants and the Public Advocate have challenged the Commission's authority to adopt the 5-acre threshold. Since the statute applies to any "land or property," the Complainants argue that the 5-acre requirement is inconsistent with the statute and, therefore, invalid. We decline to consider Complainants' argument on this point because once a rule is validly adopted, we are bound to follow its requirements. See Koch, *Administrative Law and Practice*, 2nd Ed., 1997, § 4.22 and *Virginia Committee for Fair Utility Rates v. Virginia Electric & Power Co.*, 243 Va. 320, 414 S.E.2d 834 (1992). Any departure from the terms of a rule in an adjudicatory proceeding would constitute unlawful rulemaking by the Commission in violation of the Administrative Procedure Act.

The District has indicated that the Dam itself, the property on which it sits, and the area included within two easements granted for access and egress to and from the Dam total only 0.71 acres. Bench Data Request 1-02. Therefore, the District believes that the proposed transfer of the Dam and associated easements qualifies for the *de minimis* exception provided in Chapter 691. This analysis, however, neglects to consider the fact that the District also proposes to transfer any water rights that it may possess and that accompany operation of the Dam in the Cobbosseecontee Stream. See District Exh. 3. The issues associated with consideration of the transfer of flowage rights are discussed below.

1. Are flowage rights "land or property?"

The initial question presented by consideration of potential water rights is whether these interests should be considered "land or property" within the meaning of the statute or rule. Mr. Trask and the District present related arguments that any flowage rights possessed by the District are not "property" within the meaning of the statute and rule.

George Trask argues that flowage rights attached to the land of a riparian owner are "incorporeal hereditaments"[14] that are in the nature of a privilege that can

[14]The use of the term "incorporeal hereditament" may be

be lost if not developed. Mr. Trask relies upon *Bean v. Central Maine Power Co.*, 133 Me. 9, 173 A. 498 (1934), *Union Water-Power Co. v. City of Auburn*, 90 Me. 60, 37 A. 331 (1897) and *City of Auburn v. Union Water-Power Co.*, 90 Me. 576, 38 A. 561 (1897) in support of his argument. Mr. Trask's argument, however, confuses the rights of a riparian owner to the use of the flow of water past his property with the rights of a dam owner to flood (flow) the land of upstream riparian owners; the cases cited by Mr. Trask all involve the former.[15] Those cases stand for the proposition that a riparian owner does not possess a recognizable property interest in the use of the water flowing by his property. That right is inchoate until the owner actually appropriates the flowage to his use, at which point it becomes a recognizable property right for which compensation is due if it is interfered with (*Bean*) or the power generated by the appropriation becomes taxable at the situs where the power is employed (*Union Water Power Co*.) Those cases have no application

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misleading in this context. Literally, it simply refers to anything that is not tangible or visible but is capable of passing through inheritance. *Black's Law Dictionary*, Rev. 4th Ed., 1968. All easements are considered incorporeal hereditaments (see *Rogers v. Biddeford & Saco Coal Co.*, 137 Me. 166, 168, 16 A.2d 131, 132 (1940)) but, nonetheless, a right of way or conservation easement would also generally be considered real property.

[15] *City of Auburn* is even further removed from application to the present case. In that case, the Court ruled that the City's use of water from a great pond that also served as the source for water employed by a mill downstream did not unlawfully divert water from the downstream mill.

to the status of the flowage rights at issue in the present case -- the right of a dam owner to cause the flooding of upstream property owned by others.

The District makes a related argument, citing *Bean* and *Brown v. DeNormandie et al.*, 123 Me. 535, 124 A. 697 (1924) for the proposition that the right to flood the lands of another is a statutory right or privilege, but does not rise to the level of a recognized property interest. The District asserts that the right to flood upstream lands pursuant to the Mill Act is not a property right but acts as a "deprivation of property by the State." Brief of District at 36. This position is simply untenable. In the Law Court's most recent statement on the subject, it held that "flowage rights arising from the [Mill] Act are directly tied to the ownership of the mill land, and are in *the nature of an easement appurtenant*, benefiting the mill site as dominant tenement and burdening the upstream landowners, collectively, as servient tenement" (emphasis added). *Dorey v. Estate of Spicer*, 1998 ME 202, ¶ 12, 715 A.2d 182 at 185-186 (Me. 1998), citing *Opinion of the Justices*, 118 Me. 503, 507, 106 A. 865, 869 (1920), in which the Court found that flowage rights obtained through the Mill Act "become property rights in the nature of an easement appurtenant."

In any event, the statutory definition of "land" provides that it includes:

> lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein.

1 M.R.S.A. § 72(10). This definition is broad enough to include even the most ethereal property interest. Flowage rights are, in fact, a much more substantial interest in land. The right to flood the land of another has generally been treated under the law as an easement appurtenant to land. *See* 78 Am. Jur. 2d, *Waters* §§ 206-209. That is, it represents the right of the owner of the land upon which the dam sits (the dominant estate) to flood the land of another (the subservient estate). This easement is appurtenant because it is tied to ownership of the land upon which the dam is located; the owner has no rights to flood lands apart from his or her ownership of the land upon which the dam is located. An easement appurtenant is considered to be a property interest[16] and clearly falls within the plain meaning of the term "land or property" as used in the statute and rule.

Even if we were to find that the Legislature's intent regarding this type of property interest was ambiguous, the statutory purpose supports the same result. See

[16]For a discussion of the nature of easements generally, see *Powell on Real Property*, Vol. 4, Ch. 34 (1998).

Arsenault v. Crossman, 696 A.2d 418, 421 (Me. 1996), where statutory language is ambiguous, courts look at policy behind enactment. The purpose of Section 6109 was to offer members of the public an opportunity to preserve public rights in land or property that affected the public use of bodies of water. For example, if a consumer-owned utility was offering to sell an undeveloped parcel of land abutting a waterway, the Legislature deemed that the public should have a voice in whether it wanted to retain the parcel in the public trust or allow it to be transferred to a private developer. The same purpose is implicated if we assume that a consumer-owned utility wanted to sell a conservation easement it owned on waterfront property. The same public interest is affected and, presumably, the Legislature would have intended that the same opportunity be provided to the members of the public. In the present case, transfer of the dam and its associated flowage rights could have a dramatic effect on the public's use and enjoyment of Pleasant Pond. Even though Mr. Trask has stated that he intends to maintain the Dam's operation (Tr. C-161), the concern sought to be addressed by the Legislature is not whether a private entity will actually misuse the property to the detriment of the public interest, but whether the public wants to retain its own rights in the property. That issue is assuredly raised by the District's proposed transfer of flowage rights with the Dam and falls within the ambit of Section 6109.

2. What flowage rights does the District possess?

Having found that flowage rights are "property" for purposes of the statute and rule, the next question is whether the District possesses any flowage rights in connection with the New Mills Dam. During the discovery phase of this case, the District itself was not helpful on this subject, indicating that it was unaware of what flowage rights, if any, it possessed and would simply quitclaim whatever rights it may possess when it transferred the Dam.

The fact remains, however, that the District is the owner of a dam that impounds a substantial amount of water flooding a substantial amount of land owned by others. In evaluating the District's rights in this regard, we examine three potential sources of flowage rights: (1) the Mill Act; (2) deeded rights; and (3) prescriptive rights. First, the District may have acquired flowage rights under the Mill Act, 38 M.R.S.A. §§ 651-59 & 701-28. The Mill Act is an ancient Maine statute originally intended to aid in the development of mills along the streams and rivers of the state. It authorized the construction of mills in derogation of common-law riparian rights,[17] permitting the mill owners to flood the upstream property. As

[17]Riparian rights are the rights held by the owners of the land abutting a stream or other waterway to the use of that water.

stated above, the Law Court has held that the Mill Act created an easement appurtenant in the mill land to allow the flooding of the upstream lands. *See Dorey, supra*. The New Mills Dam was built in the 1840's for the purpose of powering an associated mill. Tr. C-143. As such, it is possible that the District retains the flowage rights originally granted by the Mill Act.

Alternatively, the District may possess deeded flowage rights. *See e.g., Bennett v. Kennebec Fibre Co.*, 87 Me. 162, 32 A. 800 (1895). The District indicated that its deeded rights stretch back many years and involve numerous deeds, many of which are difficult to decipher. Nonetheless, it is possible that the District does have deeded flowage rights.

Finally, even if the District did not have legal rights to flood upstream land either through the Mill Act or by written instruments, it has long since obtained those rights by prescription. The elements of a prescriptive easement are that the adverse use be maintained without interruption for 20 years. *See* 14 M.R.S.A. § 812 and *Foster v. Sebago Improvement Co.*, 100 Me. 196, 60 A. 894 (1905), *citing Underwood v. North Wayne Scythe Co.*, 41 Me. 291. Clearly, the District and its predecessors have maintained the flooding of land sufficient to establish a prescriptive easement over the lands submerged by the Dam's impoundment.

The District, however, argues that in order for the flooding to be found to be adverse to upstream owners (a prerequisite to acquiring prescriptive rights), it must produce injury to a developed mill right upstream of the Dam.[18] The District relies upon *Bean v. Central Maine Power Co.*, *supra* and *Underwood v. No. Wayne Scythe Co.*, *supra*, however, the District's reliance upon these cases is misplaced. *Bean* involves an action to determine damages due to an upstream property owner as a result of his land being flooded by a dam. In determining the damages due to the landowner, the landowner argued that he possessed a right to develop his own dam on his land and this right had been interfered with by the loss of current due to the downstream dam's impoundment. As described above, the Law Court found that the loss of the ability to develop one's property was not compensable unless a mill had previously been developed on that site. The case does not stand for the novel proposition that the flooding of land owned by another is not adverse to that owner's use of the land.

Nor does *Underwood v. North Wayne Scythe Co.* support the District's argument. In *Underwood*, the Court

[18]The District also suggests that the limitations on its deeded rights in favor of downstream owners somehow affects its ability to obtain prescriptive flowage rights against upstream owners or to transfer its flowage rights to a new owner of the Dam. The basis for this argument is unclear and, therefore, it is not addressed in this Order.

ruled that in order to establish prescriptive flowage rights, a mill owner had to prove that the upstream landowner's property was damaged by the flowing caused by the mill dam. In analyzing this issue, care must be taken to distinguish those cases in which a mill owner seeks to establish prescriptive flowage rights *in addition to* the flowage rights granted by the Mill Act (*e.g., Underwood*) from the situation in which a dam owner seeks to establish the basic right to flow the property of another *without* the benefit of the Mill Act's statutory rights. In the latter, there is no need to establish additional special damages beyond the mere fact of flooding.[19] Such proof is required in the former situation because the mill owner already possesses the legal right to flow the lands and cannot prescriptively acquire a right that he already possesses. If he is to acquire a right by prescription, his actions must invade the upstream property owner's rights beyond mere inundation. For our present purposes, it is sufficient to find, as we do, that if the District does not possess flowage rights under the Mill Act, it has long since gained flowage rights through prescription.[20]

[19]The reported Maine cases on prescriptive flowage rights all appear to involve the extension of flowage rights previously obtained under the Mill Act. For the general rule absent application of the Mill Act, see 78 Am. Jur. 2d *Waters* § 208. Dicta in *Underwood* supports the general rule.

[20]If the District does possess Mill Act flowage rights, it is possible that the District has obtained other rights by prescription, such as the right to flow the land of another without the payment of damages normally required under the Mill Act (see, *e.g., Underwood, supra,* and *Foster v. Sebago Improvement Co.*, 100 Me. 196, 60 A. 894 (1905), but that question is beyond the scope of our inquiry.

Ultimately, we need not determine the precise nature and source of the District's flowage rights. The very fact that the District and its predecessors have maintained the water levels for such a prolonged period of time establishes that some rights exist. We are satisfied that the District possesses a legal right to flood the land submerged under the New Mills Dam impoundment.

3. What flowage rights are being transferred with the Dam?

Having found that the District possesses flowage rights in connection with the New Mills Dam, the next question is what flowage rights it intends to transfer with the Dam. In its Brief, the District contends that it is not transferring *any* flowage rights with the Dam. The District cites *Dorey* as ruling that flowage rights arising under the Mill Act can not be transferred to a new owner unless the entire parcel associated with the original mill is transferred; if only a portion of the original parcel is being transferred, no flowage rights are transferred.

The District's argument is based on a complete misreading of the *Dorey* opinion. The plaintiff in Dorey argued that he should be granted flowage rights because he had

obtained a portion of the property originally associated with an ancient mill and dam, even though he did not own the land on which the dam and mill had actually been located. The Law Court disagreed, stating that "[b]ecause we construe the [Mill] Act's provisions strictly, we conclude that only the owners of the lots actually containing the dam and the sawmill may be allowed to exercise flowage rights relative to the dam." *Dorey*, ¶ 16. Clearly, the Law Court held that flowage rights are appurtenant to the land upon which the manufacturing facilities (dam and mill) are located. If the District were right in its reading of *Dorey*, flowage rights would be *extinguished* if a property owner conveyed any portion of the original mill parcel and could only be regained if an owner reassembled the entire parcel once again.[21] *Dorey* stands for the proposition that flowage rights under the Mill Act can be transferred only with the property upon which the dam and mill are located.[22]

[21]Similarly, if the District were correct in its argument that no flowage rights are being transferred with the Dam, any purchaser of the Dam would become liable for the damages caused by its flooding of several hundred acres of land owned by others. There is absolutely no support for the District's assertion that the Cobbossee Watershed District's *restrictions* on the exercise of a dam owner's flowage rights can serve as an independent *source* of authority to flood private property. Furthermore, the Dam Abandonment Act requires the transferor of a dam to transfer all property rights necessary to operate the dam, including flowage rights. 38 M.R.S.A. § 906(2). If the District's arguments were correct, it could never comply with that requirement.

[22]Although the issue was not squarely addressed by the *Dorey* Court, it appears that flowage rights gained under the Mill Act are appurtenant to *both* the lot on which the dam is located and the lot on which the mill is (or was) located. That is, if those lots are separated, the owner of each lot would gain the flowage

The District concedes, as it must, that it is proposing to transfer the land on which the Dam sits. It follows that any flowage rights held by the District would follow the transfer of the land to which they are appurtenant. We find that the proposed transfer of the New Mills Dam would include the transfer of flowage rights.

4. Should the District's flowage rights be considered in calculating the area of the property being transferred?

The final question regarding the application of Section 6109 and Chapter 691 is whether the property to be transferred exceeds five acres in area. As stated above, the actual land upon which the Dam sits is 0.71 acres. Consideration of the flowage rights raises additional issues since the District's survey does not include the area of flowage rights.

The District and George Trask argue that we should not consider the existence of flowage rights when determining the area of the property to be transferred with the Dam. They note that as incorporeal hereditaments, the flowage rights do not have an independent physical existence but exist solely as rights appurtenant to the land upon which the Dam is

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rights pursuant to the Act.

located. They argue that the extent of flowage rights cannot be measured in acreage because the rights do not have a physical existence. For example, one would not normally refer to having a "one acre right of way," even if the boundaries of the right of way actually burdened that amount of land in the subservient estate.

Although the District and Mr. Trask may be correct that incorporeal hereditaments are not typically expressed in terms of acreage, neither has provided authority that they *can not* legally be measured in such a manner. Such a showing would be necessary in this instance since Chapter 691 of our rules requires us to measure easements in acreage. The definition of "sale" in Section 1 of Chapter 691 expressly includes the "grant of an easement."[23] If the District proposed to transfer an easement affecting water resource land, Chapter 691 would clearly apply, but *only* if the "land or property" being transferred exceeded five contiguous acres. In order to apply Chapter 691 as written, the Commission would be forced to determine whether the easement affected more than five acres, even though an easement may not normally be measured in acreage. If the Commission were prohibited from measuring easements (or

[23]The language of the Rule does not distinguish between appurtenant easements and easements in gross (an easement that is not tied to ownership of another piece of property) and we perceive no reason to draw such a distinction in this context. Such a construction would not change our result.

any other intangible property interest less than a fee interest) in terms of acreage, we would be completely prevented from treating those interests as water resource land since no intangible property interest could ever meet the 5-acre threshold.[24] Such a result would surely be at odds with the Legislative purpose to provide opportunities to retain public interests in water resource land.

Therefore, we must determine how much land is affected by the flowage rights to be transferred with the Dam. Testimony was provided to indicate that Pleasant Pond's surface area (748 acres) would be reduced by more than half if the Dam were to be breached.[25] MacMaster Exh. 1, 2 & 5. This provides evidence to indicate that the Dam's flowage rights (which must be coextensive with the area of the land submerged through operation of the Dam) easily exceed the five-acre threshold. Additional evidence is presented in Appendix A, which analyzes the extent of flooding due to the New Mills Dam under the most conservative assumptions. Even with such assumptions, the area still exceeds the five-acre threshold. For these reasons, we find that the property proposed to be transferred by

[24]Complainants suggest an alternative reading under which the 5-acre requirement attaches only to sales of physical land; under that reading, *any* easement would be subject to Section 6109. Such a construction, if adopted, would reach the same result in this case.

[25]The New Mills Dam impoundment actually extends beyond Pleasant Pond.

the District meets the qualifications as water resource land for application of Section 6109 and Chapter 691.

c. Interplay between Section 6109 and the Dam Abandonment Act

Before we can find whether Section 6109 governs the present transaction, however, we must also consider the potential application of the Dam Abandonment Act. The District has argued that the Dam Abandonment Act governs the disposal of dams to the exclusion of Section 6109. Since the Dam Abandonment Act does not provide a right of first refusal to municipalities, the District concludes that no such rights exist in the four municipalities in the present case.

All parties appear to agree that the Dam Abandonment Act applies to dams owned by consumer-owned water utilities to the extent the dam is not subject to regulation by the Federal Energy Regulatory Commission. Specifically, no party contests that the New Mills Dam is subject to the Dam Abandonment Act. The issue raised in this proceeding is whether the Dam Abandonment Act is exclusive and prohibits the Commission from applying Section 6109 to the proposed transfer of the Dam.

The District argues that the Dam Abandonment Act and Section 6109 are mutually exclusive. First, the District notes that the procedures and time frames under each regime are

substantially different. The Dam Abandonment Act requires notice to the public of the intent to abandon followed by efforts to determine if any person is interested in acquiring the dam over a 180-day period from the time a petition to abandon a dam is filed with the DEP.[26] If a new owner is located during this period, the dam owner may transfer the dam. If no new owner is located during the consultation period, various state agencies are offered the opportunity to accept the dam. If the public agencies decline to accept the dam, a final public notice is issued. If no new owner comes forward within 30 days after the final notice, the DEP may authorize the dam owner to breach the dam.

Under Section 6109 and Chapter 691, a consumer-owned water utility that wishes to sell a dam must notify the Commission and affected municipalities of its intent to sell at least eight months before the sale. The water utility must provide newspaper notices of the proposed sale within 30 days after notifying the Commission and affected municipalities. Once an agreement to sell the dam is reached, the District must notify its customers and provide an opportunity for a hearing. Customers may also petition the Commission for review of the proposed transfer. Finally, the water utility must offer

[26]The 180-day period may be extended an additional 180 days at the request of the dam owner or an affected municipality.

adjoining municipalities the right of first refusal to the dam on the same terms as it is offered to another prospective purchaser.

Contrary to the District's protestations, the procedural steps outlined in each statute are not irreconcilable. First, it must be noted that a conflict need not occur in every situation involving a consumer-owned water utility's transfer of a dam. If the water utility never seeks permission to abandon a dam by filing a petition with DEP, but simply agrees to transfer title to another, the provisions of Section 6109 and Chapter 691 can be applied without difficulty. Similarly, if the water utility files a petition to abandon with DEP and no new owner steps forward, the processes of the Dam Abandonment Act may be followed without incident and the dam may be breached without implicating Section 6109.

The issue is slightly more complicated when a water utility files a petition to abandon *and* a new owner is located (as in the present case), but not impossibly so. In such a situation, once an individual or entity indicates it is willing to accept ownership of a dam and the water utility agrees to transfer the dam, the requirements of Section 6109 and Chapter 691 apply. This requires notice to affected municipalities and the public in general.[27] The water utility may not transfer the

[27]Of course, nothing prevents a consumer-owned water utility, in anticipation of locating a transferee of a dam, from providing notice under Section 6109 before it files a petition to abandon.

dam until the Section 6109 process is complete. In addition, the water utility remains free to seek waivers of any duplicative or burdensome procedural requirements of our Rule.

We do not believe that the result described above is unreasonable. Both the Dam Abandonment Act and Section 6109 express a preference for providing every opportunity to continue the use of the subject properties to ensure continuing public benefits: Section 6109 provides for the right of first refusal and customer approval of water resource land transfers; the Dam Abandonment Act requires the owner to determine if any other entity will assume ownership, including local municipalities and agencies of State Government. In interpreting the interplay between the statutes, we must attempt to find a harmonious construction that advances the common Legislative intent to preserve public advantages in water bodies. *Cf. Lucas v. E.A. Buschmann, Inc.*, 656 A.2d 1193 (Me. 1995), holding that separate statutory provisions must be read harmoniously in the context of the overall statutory scheme.

We find that the best construction of the interplay between the two statutes permits a consumer-owned utility to pursue the dam abandonment process, but if it finds an

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If a water utility desires to minimize any possible delays in transferring a dam, this practice would probably be the most efficient alternative.

entity that wishes to accept ownership of the dam, it must first provide the offer of first refusal to adjoining municipalities and follow the procedural steps of Chapter 691 (if the 5-acre threshold is met). This interpretation advances the purposes of both statutes by requiring the utility to search for a new owner of a dam and by providing the public with a final opportunity to preserve the public rights associated with the dam.

The District argues that this result is unacceptable for several reasons. First, the District argues that since the Dam Abandonment Act was enacted subsequent to Section 6109, it has implicitly repealed any conflicting provisions of Section 6109. Such a result would create untenable consequences. If, as we find above, Section 6109 was originally intended to apply to a consumer-owned water utility's sale of a dam, a water utility that wished to transfer a dam without offering first refusal to an adjoining municipality could do so simply by filing a petition to abandon and then transferring the property to its intended recipient. We agree with the District that the Dam Abandonment Act is available to water utilities that wish to abandon a dam. We do not agree, however, that by providing a mechanism for the abandonment of dams, the Legislature intended to remove *any* prior limitations on the transfer of dams by consumer-owned water utilities. We can perceive no reason why the Legislature would have created a right

of first refusal in water resource land generally, but then negated that right if the property in question happens to be a dam that also happens to be the subject of an abandonment petition. The statutory purpose of protecting public recreation and conservation rights is equally implicated in either situation.

Our interpretation also follows the maxim of statutory interpretation that the more specific governs the general. See *In re McLoon Oil Co*., 565 A.2d 997, 1008 (Me. 1989). Section 6109 is more specific in that it applies only to consumer-owned water utilities; the Dam Abandonment Act applies to *any* entity that seeks to breach a dam. The District argues that the Dam Abandonment Act should be viewed as more specific because it applies to only dams, while Section 6109 applies to the transfer of *any* water resource land. The District's view of the Dam Abandonment Act is too broad. The Dam Abandonment Act may be more specific with regard to the *abandonment* of dams and the issuance of a breach order by DEP, but not necessarily to *any* transfer of a dam. As noted above, the Act would not even apply to a consumer-owned water utility's sale of a dam where no petition to abandon was filed.

The District also contends that Section 6109 interferes with the process established by the Dam Abandonment

Act because it would delay the transfer of a dam to a new owner while the procedural mechanisms of Section 6109 are followed. We do not believe that any such delay would seriously impede the accomplishment of the purposes of the Dam Abandonment Act. Although the Dam Abandonment Act requires efforts to locate a new owner, it never indicates any preference for a rapid transfer to any such new owner. In fact, the Act never requires *any* transfer to occur. It merely limits the owner's right to breach the dam if another prospective owner comes forward.

The District also questions the desirability of Commission review of the terms of a sale of a dam, particularly with regard to a sale to a state agency. Regardless of the identity of the buyer of utility property, the Commission retains its obligation to ensure that a water utility does not impair its ability to provide adequate service to its customers by disposing of property that is necessary for the discharge of its duties.[28] See 35-A M.R.S.A. § 1101. We see nothing strange in authorizing the review of the proposed sale of a dam; it may

[28]Section 6109, subsection 3 expressly exempts transfers of water resource land to a public agency from normal prudence review regarding the value received in exchange for the water resource land. This provision also answers George Trask's concerns that the District's ratepayers will receive no better compensation from the City of Gardiner if it exercises its right of first refusal. For this particular type of water utility property, the Legislature has determined that the retention of public rights outweighs the ratepayers' interests in fair compensation.

well be true that a dam continues to serve a valuable purpose for some water utilities. See discussion in Part III(B)(7) below.

The District also expressed concern regarding Section 6109's provisions related to the compensation received in return for water resource land. The District suggested that this focus on compensation was in conflict with the Dam Abandonment Act's intent to maximize the likelihood of locating a new owner for a dam. This "conflict," however, merely reflects the tension between the State's desire to maximize the likelihood of retaining dams and the desire to protect water utility ratepayers from imprudent utility property transfers. In any event, if no buyer can be located who will offer compensation for a dam, that fact alone is powerful evidence that the dam has no fair market value. See discussion in Section III(B)(8) below.

Finally, as counsel for the District conceded (Tr. C-49-50), the Dam Abandonment Act seeks to identify entities that wish to assume ownership of a dam, but if more than one entity seeks to obtain a dam, it does not give any guidance as to which of the competing entities should be selected to receive the dam. Section 6109 fills that gap in the Dam Abandonment Act by specifying that if the dam is owned by a consumer-owned water utility, the local municipality has the right of first refusal.[29]

[29]While we concur with the District that offering a local

d. If Section 6109 applies, which municipality receives a right of first refusal?

Based on the above discussion, we find that the District's proposed transfer of the New Mills Dam is subject to Section 6109 and Chapter 691. This finding, however, raises yet another question -- which municipality is afforded the right of first refusal to which property interest? Section 6109(5) provides that "[t]he municipality in which the land is located shall have the right of first refusal to purchase any land that lies within that municipality's boundaries." In this regard it must be remembered that the flowage rights do not exist in the submerged land, but are appurtenant to the land on which the Dam sits. "[A]n easement that is appurtenant is incapable of existence separate and apart from the particular messuage or land to which it is annexed, there being nothing for it to rest upon," *Ring v. Walker*, 87 Me. 550, 558, 33 A. 174, 176 (1895). Stated another way, the District is not proposing to transfer any interest in property other than the rights that exist in the New Mills Dam lot itself, including the flowage rights.

Nonetheless, Complainants have urged this Commission to create a right of first refusal in each of the four municipalities. Although they recognize that the flowage rights

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municipality the right of first refusal as against a state agency offering to accept ownership of a dam is unusual, we are not so troubled by that unlikely result that we would absolve a water utility of all of its responsibilities under Section 6109.

are appurtenant to the Dam site located in the City of Gardiner, they argue that the flowage rights affect the flooded land that is located in each of the four municipalities. Therefore, they suggest that Gardiner be given an initial right of first refusal, and if that right is not exercised, the right should pass sequentially to the other affected municipalities in order of their relative shares of the flooded lands.

Although we see the logic of the Complainants' proposal, that is not the rule established by the statute. Under Section 6109, the right of first refusal is possessed by the municipality in which the property to be transferred is located. In the present case, all legal property rights exist in the New Mills Dam site, located in Gardiner. Therefore, the statutory right of first refusal is possessed solely by the City of Gardiner. The statute also provides, however, that the right of first refusal is assignable by the municipality. 35-A M.R.S.A. 6109(5). It would therefore be within its rights for the City of Gardiner to exercise its right separately or in concert with the other municipalities affected by the New Mills Dam or to transfer its right to any other entity.

6. <u>Can the agreement between the Gardiner Water District and Councilor Trask be investigated to</u>

ensure that it is in the best interest of the public?

The Complainants have asked this Commission to review the terms of the agreement to transfer the Dam to Mr. Trask and to determine whether that agreement is in the public interest. Although we find that the Commission has limited jurisdiction to review the agreement's terms to ensure that the District Trustees acted reasonably and prudently on behalf of the District's customers, we must decline to undertake the wider review sought by Complainants in this case.

The Legislature has granted this Commission broad powers to regulate public utilities, but those powers are specifically to be exercised to "assure safe, reasonable and adequate [utility] service." 35-A M.R.S.A. § 101. It is true that our authority and applicable standards are often described in very general terms, *e.g.* utilities must furnish "safe, reasonable and adequate facilities and service" (35-A M.R.S.A. § 301) and Commission must determine generating facility or transmission line to be justified by "public convenience and necessity" (35-A M.R.S.A. § 3132). Although the precise boundary of our powers may be nebulous, the Commission's focus in exercising those powers is narrowly drawn. We must examine a public utility's actions to determine whether their effect on utility customers and utility shareholders is reasonable.[30]

[30]Both the Complainants and the Public Advocate cite the reference to our investigatory power under 35-A M.R.S.A. § 1302

In short, absent specific statutory authorization, the Commission may not employ its broad authority to regulate utilities to review utility actions to determine if, in our opinion, the general public good has been served. Therefore, we decline to consider issues such as whether the District should have considered the needs of shorefront property owners or public users of Pleasant Pond when determining what action to take on the Dam.[31] Our review is limited to whether the District acted reasonably and properly considered the needs of its customers. 35-A M.R.S.A. § 301(1).

With regard to the reasonableness of the District's actions in this case, the Complainants and the Public Advocate argue that it was unreasonable for the District to transfer the Dam to Mr. Trask without first investigating whether

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to determine if a utility action is "in any respect unreasonable" in support of a broad reading of our authority to nullify the proposed transfer. That language, however, only refers to the Commission's authority to *investigate* utility actions. Our regulatory powers are not coextensive with our broader investigatory authority. See *Central Maine Power Co. v. Maine Public Utilities Commission*, 395 A.2d 414 (Me. 1978).

[31]The Complainants and the Public Advocate argue that the policies underlying Section 6109 require the District to undertake an independent evaluation of whether the proposed transfer is consistent with the legislative purpose to encourage the retention of public recreational or conservation interests in water utility property. Those policies, however, are embodied in the black-letter requirements of Section 6109; the encouragement of public ownership of water utility property is completely accomplished by providing the notices and offering the right of first refusal required by the statute. The Commission is not free to further the statutory policies by expanding upon the actual requirements of the law.

he possessed the financial and technical capabilities to operate and maintain the Dam. The Complainants argue that this failure was unreasonable because it threatens public safety, risks the public's interests in the recreational and conservation values of the Dam, and jeopardizes vital assets owned by the District and its ratepayers.

a. Were the District's actions unreasonable with regard to public safety?

First, as to public safety, the Complainants argue that improper operation or inadequate maintenance of the Dam may risk catastrophic damage in the event of a subsequent breach. The Commission certainly appreciates the gravity of the public's interest in dam safety and would readily agree that improper operation or inadequate maintenance of a dam by a water utility could well be an unreasonable utility act. We do not perceive, however, that this obligation necessarily carries over to a transfer of the dam. The situation can be analogized to one in which a utility sells a large, dangerous piece of heavy equipment. If we reviewed such a transaction, the Commission would determine whether the property was needed for utility operations and whether the utility had received fair compensation for the equipment. We would not, however, attempt to determine whether the transferee could competently operate the equipment, even if negligent operation might create a risk of harm to others. Although we recognize that the dangers associated with a

dam are more widespread than those in our example, that concern is more properly directed to the State Legislature. Questions regarding dam safety range far beyond the expertise and jurisdiction of this Commission. For the foregoing reasons, we decline to find that utilities have a general obligation to inquire into the capabilities of purchasers of utility property to safely operate and maintain that property.

We acknowledge, however, that "reasonableness" is a protean concept, not susceptible of precise definition. We are, therefore, hesitant to precisely circumscribe the Commission's authority to prohibit certain utility actions that may pose a safety threat to the general public. We agree that extreme circumstances may arise that would require the Commission to intervene to protect public safety, but we do not believe that such circumstances have been demonstrated to exist in the present case. The absence of evidence demonstrating Mr. Trask's capabilities to operate and maintain the Dam does not necessarily lead to the conclusion that the Dam will become a public safety hazard if the transfer were to occur.

b. Were the District's actions unreasonable with regard to the protection of public recreation and conservation interests?

Next, the Complainants argue that the policies animating Section 6109 require the District to evaluate

Mr. Trask's ability to properly operate the Dam in order to protect public recreational or conservation opportunities associated with the Dam impoundment. As we discussed above, however, the policies of Section 6109 are embodied in the procedural requirements of that statute. The Legislature could have explicitly required water utilities to undertake the type of analysis desired by the Complainants, but it did not do so.

c. Were the District's actions unreasonable with regard to the protection of other District facilities?

Finally, the Complainants and the Public Advocate argue that the District should have investigated Mr. Trask's ability to maintain the dam in order to protect other District facilities from damage if a breach were to occur. There is no evidence in this record, however, that would permit the Commission to make a finding that any District facilities would be placed in jeopardy by improper operation or maintenance of the Dam. The Complainants and the Public Advocate apparently misread the plan attached to the District's Notice of Intent to File Petition for Release from Dam Ownership. District Response, Exh. 12. In our review, the plan indicates that the District's pump station and filter building are located *above* the level of the water retained by the Dam. No other record evidence has been cited by any party that would support the assertion that District facilities would be at risk.

7. Does the Gardiner Water District require Commission approval under 35-A M.R.S.A. § 1101 to transfer the Dam?

Title 35-A, Section 1101 requires a utility to obtain Commission approval before transferring any "property that is necessary or useful in the performance of its duties." The District has suggested that since it no longer uses the Dam impoundment as a water source, the property does not serve any useful purpose in fulfilling the District's duties and, therefore, Commission approval of the Dam transfer is not required under Section 1101.

In the course of this proceeding, the Commission Staff pursued the issue of whether the Dam and its impoundment might serve some use as a back-up source of water for the District. Initially, the District suggested that it has arranged for the Hallowell Water District to provide a back-up supply through an interconnection with the District. District Response at 2, nt. 1. It subsequently became apparent that this source is limited geographically and in scope. Bench Data Request 1-08. The District then suggested that each of its two wells serves as a back-up supply for the other should one well fail for any reason. Tr. C-100. It is possible, however, that both wells could become contaminated, or, if one well was contaminated, the use of the other well could cause the contaminant to leach into

the second well. In addition, the District stated that the Cobbosseecontee Stream is tainted and unsuitable for a public water supply. This argument neglects to consider that the issue is whether the Stream may be useful as an *emergency back-up* supply. In that role, the quality of the water is a secondary concern. Finally, the District stated that it would be possible to move the District's pumping facilities and draw water from the stream itself even without the impoundment of the Dam and further noted that when its new treatment plant is completed, the District will no longer have inputs located in Cobbosseecontee Stream. Tr. C-145.

The District's answers leave unclear what the District would do to provide a suitable back-up water supply in an emergency where both of its wells became unavailable. Mr. Trask indicated, however, that he would be willing to stipulate that the District could retain its rights to draw water from the Dam impoundment after any transfer of the Dam. Tr. C-139-140. This stipulation obviates the need for further investigation into whether the proposed transfer would hinder the District's ability to provide a back-up water supply. Although the District's future plans are not before us in this case, unless the District is prepared to offer a suitable alternative, the District would be well advised to maintain their current ability to use the stream as a back-up supply. Nonetheless, we find that given Mr.

Trask's stipulation to permit continued use of the stream as an emergency water source, the Dam would not be necessary or useful to the District's operations for purposes of section 1101 if the proposed transfer to Mr. Trask were to occur. The District should take care to explicitly reserve such rights in any transfer of the Dam that may occur after the issuance of this Order.

8. Has the Gardiner Water District made reasonable efforts to capture any fair value that the Dam may retain?

As discussed above, our review of the details of the proposed transfer is limited to ensuring that the District Trustees acted reasonably and prudently in agreeing to transfer the Dam to Mr. Trask. However, given our finding above that the District must offer a right of first refusal to the City of Gardiner and the uncertainty as to whether Mr. Trask's offer will remain on the table, we need not definitively address at this point whether the terms of the present agreement are reasonable and prudent. If the Dam is ultimately transferred to a public entity, this issue becomes moot. The statute expressly forbids the Commission from finding a transfer of water resource land to a public entity at below market value to be unreasonable or imprudent on account of the sale price. 35-A M.R.S.A. § 6109(3).

Because it is possible, however, that the City of Gardiner may not exercise its option, we will discuss briefly the

issues surrounding the terms of the proposed sale to Mr. Trask. The District has agreed to transfer the Dam to Mr. Trask for $1.00. Tr. C-11 & C-88. Although this proposal involves obviously nominal consideration, it does not appear to be unreasonable or imprudent given the unique circumstances of this case.

First, it is undisputed that the District has expended considerable sums to maintain and operate the Dam in recent years. District Response, Exh. 4. The avoidance of these costs is a major reason the District seeks to sell the Dam. On the other hand, it is not unreasonable to assume that a piece of property into which so much money has been invested should retain some value. Second, the mere presence of and interest expressed by upstream property owners further indicates that the Dam has considerable value to them as property owners; a disruption in the maintenance of water levels in Pleasant Pond would have a serious deleterious effect on their lifestyle and property values. Finally, the public recreation opportunities afforded by Pleasant Pond also appear to have value to the users of the Pond.

The unusual crux of this case is that although the Dam creates value for many individuals, it appears to be very difficult to capture that value. Mr. Trask has agreed to assume ownership of the Dam on the basis that he *may* be able to obtain

contributions toward Dam maintenance from those persons benefited by the Dam. He *hopes* to be able to secure sufficient contributions to defer his associated expenses and provide some profit on his investment. Tr. C-76-78. Mr. Trask has no guarantee of success, however. As he admitted, he cannot force anyone to make contributions for his efforts. Tr. C-160-165. In fact, the lack of other entrepreneurs seeking to obtain the Dam for similar purposes reflects either the difficulty of Mr. Trask's task or his unique foresight.[32] In either event, it is apparent that his business plan involves a high-risk strategy for obtaining a return. It is difficult to place a high value on such a risky opportunity.

Second, the District did engage in some efforts to sell the Dam. It asked Synergics Energy Development Company if it would be interested in purchasing the Dam and its associated hydroelectric facilities. On April 8, 1998, Synergics responded that it was not interested. District Exh. 4. Mr. John Bogert, who oversees the operation of the CHI hydroelectric facilities downstream in Gardiner, also indicated that CHI was not interested in purchasing the Dam (Tr. C-194, C-200). Mr. Bogert added that the Dam would be unlikely to have additional value to

[32]Although the Complainants and Ms. Glenna Nowell (City Manager of Gardiner) asserted that the municipalities were interested in ownership of the Dam, no party could affirmatively state that *anyone* other than Mr. Trask was prepared at this time to assume ownership of the Dam. Tr. C-207-209.

anyone who wished to operate the District's hydroelectric facility, other than to avoid the deleterious operation of the Dam by another purchaser. Tr. C-192, C-195-196. Again, such limited utility is unlikely to fetch a high price.

The Public Advocate argues that the trustees should have actively sought a competing bid from the four municipalities in order to maximize the compensation received for the Dam. We agree that if the Dam does have value to someone, that value should be maximized by having a municipal "competitor" for the purchase of the Dam. It appears that the Trustees' focus on the expiration of the 180-day consultation period under the Dam Abandonment Act may have blinded them to other opportunities to maximize a return on the Dam. On the other hand, the District had reason to believe that the municipalities' interest was only as a buyer of last resort and the towns would have been satisfied if anyone else appeared to accept ownership of the Dam. Tr. C-34 and C-111-116. Although it may have been desirable for the District to make further efforts to attract competitive bids, on this record, we do not believe that it was unreasonable for the District to assume that no better offer for the Dam would be forthcoming.

Therefore, it appears that the terms of the proposed transfer to Mr. Trask would be upheld as reasonable and

prudent. Although the District would receive only nominal compensation for the Dam, it would also be avoiding future expenses and potential liability associated with ownership of the Dam.[33] In any event, an ancillary benefit of a municipality possessing a right of first refusal is to provide an incentive for Mr. Trask (and any other interested person) to maximize his payment for the Dam so as to make the municipality's exercise of its option less likely.

C. Waiver of Chapter 691 Requirements

1. Should the Commission waive the requirement that the City of Gardiner be given the right of first refusal?

The District has requested that if we find that Section 6109 and Chapter 691 apply to the proposed transfer of the New Mills Dam, we grant a waiver of the requirement that the District offer the City of Gardiner a right of first refusal. The Commission lacks the authority to grant the requested waiver. Although Chapter 691 authorizes a waiver for good cause, such a waiver is only available if it is permitted by statute. Chapter 691, § 6. The only waiver of a statutory requirement permitted under Section 6109 is a waiver of all or part of the 8-month

[33]See Order, *Central Maine Power Company, Re: Application for Authorization under Section 1101 of 35-A M.R.S.A. to Sell Property*, Docket No. 92-006, February 19, 1992, in which the Commission approved a utility's sale of a "marginally useful" dam in return for $1.00 consideration based upon avoided maintenance and operation costs.

notice requirement. 35-A M.R.S.A. § 6109(2). We cannot grant the requested waiver.

Nor can we ignore the statutory mandate by assuming that the District's offer to sell the Dam to the four municipalities satisfied the requirements of Section 6109. A right of first refusal requires the existence of another prospective purchaser -- the District must have in hand an offer to purchase the water resource land that is acceptable to it. Only then can the District offer the relevant municipality the option to purchase the property on the same terms. The District has not met its obligations under Section 6109 in this instance.

2. Should the Commission waive the notice requirements of Chapter 691?

Chapter 691 requires a water utility that intends to sell any water resource land to notify, at least eight months before the sale occurs, the Commission, affected municipalities, and other water utilities with rights to draw water from the water body in question.[34] The utility must also publish newspaper notice of the intended sale within 30 days after notifying the Commission. The Complainants and the Public

[34]As noted above, the 8-month notice requirement appears in Section 6109 but the Commission is expressly authorized to waive that requirement for good cause.

Advocate oppose any waiver of these notice requirements primarily on the basis that the four towns need to have sufficient time to complete an interlocal agreement to assume ownership of the Dam.[35] In addition, town meetings for three of the affected municipalities are not scheduled until late winter or early spring of next year.

In response, George Trask points out that the City of Gardiner (which holds the right of first refusal) can meet and approve the purchase of the Dam on very short notice. Furthermore, each of the other towns need not wait till next year but can call a special town meeting to consider the purchase of the Dam. 30-A M.R.S.A. §§ 2521 & 2523 permit the town selectmen to call a town meeting with only seven days' notice. Even if the selectmen decline to call the meeting, they can be forced to call a special town meeting within 60 days by petition of at least 10% of the number of voters in the last gubernatorial election. 35-A M.R.S.A. § 2522.

If we find (as we have) that Section 6109 applies to the New Mills Dam, the District also supports the waiver. It argues that the municipalities have now had a full year's notice of the District's intent to sell the Dam. In addition, the

[35]The Complainants also argue against waiver of the requirements of Chapter 691, § 4, to hold a public meeting for water district customers to consider the proposed transfer. This Order does not waive that requirement.

municipalities were nearing completion of the interlocal agreement when the District attempted to accept Mr. Trask's offer to purchase the Dam.

We agree that a waiver of the 8-month notice period is appropriate in this instance. All of the relevant parties have been notified of the District's desire to sell the Dam. The only possible purpose such an extended period could serve now would be to permit time for the municipalities to act on an offer (if they choose to act in concert -- the City of Gardiner alone possesses the right of first refusal). It is clear, however, that the municipalities need not wait until next year's town meetings to approve a purchase. Moreover, any remaining work on the interlocal agreement should be relatively simple at this stage. We find that these circumstances provide sufficient cause to justify the waiver of Section 2 of Chapter 691. There is no need to require the District's ratepayers to support the continued operation and maintenance of the Dam for any longer than is necessary to satisfy the purposes of Section 6109.

To clarify the application of the requirements of Chapter 691, we start from the premise that there is currently no offer to purchase the New Mills Dam. If Mr. Trask chooses to renew his original offer or he (or anyone else) chooses to make a

new offer to purchase the Dam on terms satisfactory to the District, the District must offer the Dam to the City of Gardiner on those same terms. The City will have 90 days from receipt of that offer in which to exercise its right of first refusal (on its own or in concert with the other affected municipalities) or transfer that right to another party. When the buyer has been identified, the District must hold a meeting as required under Section 4 of Chapter 691 within 60 days before the closing date for the sale of the Dam.

IV. CONCLUSION

In addition to our analysis above, we wish to add some closing comments regarding the District's actions in this matter. Although we overturn the District's attempt to transfer the New Mills Dam to Mr. Trask, we wish to emphasize that we do not believe that the Trustees or any other person had anything other than honest motives in structuring and pursuing the proposed transaction. Although the process employed by the District was less than precise and failed to follow the letter of the law, we believe that these failures were the result of inattention to certain requirements and an understandable rush to comply with vaguely understood deadlines established in the Dam Abandonment Act. It is unfortunate but understandable that this failure in process has led some to question the motivations and practices of the District in this circumstance. We hope that the process

afforded in this proceeding has helped to dispel these questions and provide guidance to the District in how to handle any similar matters in the future to promote public confidence in the conduct of its business.

Finally, to clarify the impact of our decision in this case, we here summarize the present status of the New Mills Dam. The Trustees' actions in attempting to accept Mr. Trask's offer to purchase the New Mills Dam are void due to the failure to follow the procedures of 35-A M.R.S.A. § 6109 and Chapter 691 of the Commission's Rules. It is up to Mr. Trask to determine whether to make an offer to purchase the Dam on his original terms or as modified if he chooses. In either case, the District must follow the procedures outlined in Chapter 691 of our Rules, except that the Commission waives the notice requirements of Section 2 of Chapter 691. If the District receives no offers, the District is free to pursue its option to seek authority to breach the Dam.

Accordingly, we

O R D E R

1. That the actions of the Gardiner Water District Board of Trustees in purporting to accept the offer of Mr. George Trask to purchase the New Mills Dam are void;

2. That any transfer of the New Mills Dam is subject to the procedural and substantive requirements of 35-A M.R.S.A. § 6109 and Chapter 691 of the Commission's Rules, except that application of Section 2 of Chapter 691 is waived if the transfer occurs before December 31, 1999; and

3. That if the Gardiner Water District chooses to act on an offer to purchase the New Mills Dam from Mr. George Trask or any other individual or entity, it must offer the City of Gardiner the right of first refusal in accordance with 35-A M.R.S.A. § 6109 to purchase the Dam on the same terms and conditions.

Dated: November 10, 1998

Respectfully submitted,

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Gilbert W. Brewer
Hearing Examiner